IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 250 OF 2003
IN
CRIMINAL APPEAL NO. 47 OF 2003

Miss Joaquina Cardozo,
resident of House No.1332,
Conjem, V.P.Curtorim,
Taluka Salcete, South
District, Goa. ... Applicant

versus

1. Shri Santa Rita Menezes,

2. Shri Allan Menezes,

3. Shri Rui Menezes,
   All sons of late
   Francisco Menezes,
   All r/o Ward Conjem,
   V.P.Curtorim, Salcete.

4. The State of Goa,
   through Directorate of
   Prosecution, Old G.M.C.
   Complex, Panjim-Goa. ... Respondents

Mr. D. N. Moratgikar, Advocate for the Applicant.

Ms. Amira Razak, Advocate under Legal Aid Scheme for Respondent Nos.1 to 3.

Mr. S. N. Sardessai, Public Prosecutor for the State/ Respondent No.4.

CORAM : P. V. HARDAS,J.

DATE : 29TH JANUARY, 2004.

ORAL JUDGMENT

This is an application for grant of leave to file Appeal against acquittal for assailing the acquittal of the Respondents/Accused for offences punishable under Sections 352, 427 and 504 of the Indian Penal Code, passed by the learned Judicial Magistrate First Class 'C' Court, Margao, by Judgment dated 7th February, 2003, in Criminal Case No.359/P/93/C.

2. Initially, the Applicant/Complainant had filed Criminal Appeal No.47/2003 and subsequently this application for grant of leave came to be filed. This Court by its Order dated 22nd January, 2004, had condoned the delay. In the Appeal which has been filed, the Applicant/Complainant has prayed at prayer Clauses (c), (d) and (e) as follows:-

> (c) That Your Lordship on hearing of the above matter be pleased to set-aside the Judgement & Order dated 07th, February, 2003, and to direct the Trial Court to hold fresh trial by allowing the application of the Complainant to secure the attendance of its witnesses as prayed in the application dated 7th, February, 2003 and

in the application dated 18th, October, 2002, at exhibit No.D-39, be allowed in toto to examine both witnesses.

(d) That thereafter on closing the Complainant's evidence of witnesses, the Accused No.2, be ordered to remain present in Court for his statement under section 313, and be allowed to cross-examine.

(e) That Your Lordship be pleased to order the Accused No.1 and 3 to be available for cross-examination on the documents produced by them. And not to depart without the leave of the Trial Court.

3. The learned Trial Court had acquitted the Respondents/Accused on the ground that the version of P.W.1 did not find support in any type of evidence, either documentary or oral. The learned Trial Judge further held that even the complaint lodged with the Police by P.W.1 was not produced on record to corroborate the incident. The learned Trial Judge also found that the defence of Accused No.3 that the Village Panchayat had demolished the compound wall of the Applicant/Complainant was borne out by the admission of P.W.1 in her cross-examination that a complaint was lodged by the mother of the Respondents/Accused with the Panchayat and also with

the Mamlatdar regarding the blocking of the road. P.W.1 has further admitted that a show cause notice was issued to her by the Panchayat. P.W.1 had further admitted that the wall was constructed by her in her property but by encroaching on the road. She has also admitted that the Panchayat had constructed a road through her property. The learned Trial Court, therefore, gave the benefit of doubt and acquitted the Respondents/Accused.

4. Mr. D. N. Moratgikar, learned Counsel appearing on behalf of the Applicant/Complainant has urged the following points:-

1. The Applicant/Complainant ought to have been granted an opportunity of cross-examining the Respondents/Accused when their statement was recorded by the Court under Section 313 of the Code of Criminal Procedure.

2. The Trial Court should not have closed the evidence of the Applicant/Complainant but ought to have granted an opportunity of examining the Police Officers of the Maina Curtorim Police Station for proving the report.

5. In respect of the first submission namely that the Applicant/Complainant ought to have been granted an opportunity of cross-examining the

Respondents/Accused after recording their statement under Section 313 of the Code of Criminal Procedure, is a submission which is untenable in law. The procedure as established by the Code of Criminal Procedure, does not contemplate conferring of any rights on the Applicant/Complainant or the prosecution to cross-examine the Respondents/Accused after their statement under Section 313 of the Code of Criminal Procedure is recorded by the Court. In the present case, since the Respondents/Accused did not step into the witness box and examine themselves as witnesses, the Applicant/Complainant had no right to cross-examine the Respondents/Accused. There has been, therefore, no failure of justice in not affording any opportunity to the Applicant/Complainant for cross-examining the Respondents/Accused.

6. The complaint was admittedly filed on 28th September, 1993. For one reason or the other, the proceedings came to be adjourned. After the evidence of the prosecution witness was recorded, a summons was issued to the Station House Officer of Maina Curtorim Police Station for production of the Original Report lodged by the Applicant/Complainant. The Order Sheet dated 31st December, 2002, records that in response to the summons, it was recorded that

the records for the relevant period had been destroyed. The Applicant/Complainant was then directed to take necessary steps to secure the presence of the witness, if any. The case was then adjourned to 27th January, 2003. The Order Sheet of 27th January, 2003, records that no witnesses were present inspite of several opportunities given to the Applicant/Complainant to secure her presence and as the matter was very old, the Applicant/Complainant's evidence is closed. The learned Trial Court then recorded the statement under Section 313 of the Code of Criminal Procedure and by the Judgment impugned in the present Appeal acquitted the Respondents/Accused.

6. From the perusal of the Order Sheet, it is apparent that the Applicant/Complainant had been afforded reasonable opportunity of proving its case. However, after the destruction of the original record at the Police Station, the Applicant/Complainant did not take effective steps for leading secondary evidence to prove the report. The Criminal Case had remained pending on the file of the learned Judicial Magistrate First Class 'C' Court, Margao, for nearly 9 1/2 years and as such, the learned Judicial Magistrate First Class 'C' Court, Margao, cannot be faulted for having closed the evidence of the Applicant/Complainant after the Applicant/Complainant

was given reasonable opportunity of establishing her case.

7. After giving my anxious consideration to the submissions advanced by the learned Counsel appearing on behalf of the parties, I am of the considered opinion that there is no perversity in the reasoning of the learned Trial Court to warrant any interference in the present application for leave. The appreciation of the evidence by the learned Trial Court and the view taken therein is a possible view to be taken on the basis of the evidence on record. Thus, there is no merit and Criminal Miscellaneous Application No.250 of 2003 is dismissed. Accordingly, Criminal Appeal No. 47 of 2003 is also dismissed.

P. V. HARDAS, J.

RD.